

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF KINGS: CRIMINAL TERM: PART: 1

-----X

3 THE PEOPLE OF THE STATE OF NEW YORK,

Indict. No.

3464/06

4  
5 -against-

Cont'd Hearing

6 GENERAL WAITERS,

7 Defendant.

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8  
9 320 Jay Street  
10 Brooklyn, New York 11201  
11 May 29, 2014

12 B E F O R E:

13 HONORABLE DEBORAH A. DOWLING,  
14 Justice

15 A P P E A R A N C E S:

16  
17 OFFICE OF KENNETH P. THOMPSON, ESQ  
18 District Attorney, Kings County  
19 BY: MARK HALE, ESQ.  
BY: RHEA GROB, ESQ.  
Assistant District Attorneys

20  
21 GARY FARRELL, ESQ.  
22 Attorney for the Defendant  
305 Broadway  
New York, New York

23  
24  
25 THERESA J. SANTILLI, CSR  
Official Court Reporter

1 THE CLERK: This is 1 on the calendar, 3464 of  
2 2006, People of the State of New York against General  
3 Waiters.

4 MR. FARRELL: For Mr. Waiters, Gary Farrell,  
5 305 Broadway, New York, New York.

6 Good morning.

7 THE COURT: Good morning.

8 MR. HALE: For the District Attorney, by Mark  
9 Hale.

10 MS. GROB: Rhea Grob, G-R-O-B.

11 Good morning.

12 THE COURT: Good morning.

13 THE CLERK: The defendant is now present and  
14 before the Court.

15 MR. FARRELL: Your Honor, before I call the  
16 next witness who I understand is outside, I have a brief  
17 application. I would ask for a copy of the minutes  
18 pursuant to county law. Mr. Waiters was indigent at the  
19 trial you presided over. He remains indigent.

20 THE COURT: Certainly if you're appointed 18B  
21 you're entitled to the minutes.

22 MR. FARRELL: Okay.

23 THE COURT: Any matters to go on the record  
24 before we begin?

25 MR. FARRELL: No, your Honor, not from the

1 defense.

2 MR. HALE: No, your Honor.

3 MR. FARRELL: Judge, the defense calls Calvin  
4 Simons.

5 A COURT OFFICER: Ready, your Honor?

6 THE COURT: Yes.

7 A COURT OFFICER: Watch your step, remain  
8 standing and face the clerk.

9 THE CLERK: Raise your right hand.

10 C A L V I N S I M O N S, a witness called on behalf  
11 of the Defense, having been first duly sworn, was  
12 examined and testified under oath as follows:

13 THE CLERK: Have a seat.

14 THE WITNESS: Thank you.

15 THE CLERK: Pull up your chair, speak in the  
16 microphone.

17 In a loud, clear voice state for the record  
18 your full name.

19 THE WITNESS: Calvin J. Simons.

20 THE CLERK: Thank you. There's water there for  
21 your convenience.

22 THE COURT: Good morning, Mr. Simons.

23 Again, I'm going to ask that you please keep  
24 your voice up and speak as loud as you were just talking.

25 Certainly, Mr. Simons, if any of the attorneys

1 ask you a question and you're not quite sure what they're  
2 asking you, I don't want you to guess. If the question  
3 isn't clear to you, you let them know, they will  
4 rephrase, and then you'll answer the question after it's  
5 been rephrased.

6 Certainly, I will say to you if any of the  
7 attorneys make an objection, do not answer the question  
8 until after I've ruled on that objection.

9 Do you understand that, Mr. Simons?

10 THE WITNESS: Yes.

11 THE COURT: You may inquire.

12 MR. FARRELL: Thank you, your Honor.

13 DIRECT EXAMINATION

14 BY MR. FARRELL:

15 Q Good morning, Mr. Simons.

16 A Good morning.

17 Q How long have you been an attorney?

18 A Since 1983.

19 Q Where did you begin your career as far as  
20 practicing as an attorney?

21 A The Legal Aid Society.

22 Q And in the criminal defense division?

23 A Yes.

24 Q How long were you there?

25 A I left in 1997, I believe.



1 Q And have you been in private practice ever  
2 since?

3 A Yes.

4 Q And are you currently -- well, I'll  
5 withdraw that. Thank you.

6 Did there come a time you became a member  
7 of the Assigned Counsel Plan for the Second Department?

8 A Yes.

9 Q When was that?

10 A 1997.

11 Q And when you came out in 1997 were you  
12 immediately what's known as felony certified?

13 A Yes.

14 Q And did there come a point that you became  
15 certified to handle people charged with A-1 felonies,  
16 such as homicide?

17 A Yes.

18 Q When was that, sir?

19 A '97.

20 Q And from 1997 up to and including today,  
21 as you sit here on the stand, do you continue to  
22 represent people charged with homicides?

23 A Yes.

24 Q And I know it might be tough but I'm only  
25 asking for an estimate, how many such assignments do

1 you think you've received from 1997 to the present?

2 A Hundreds.

3 Q Mr. Simons, I'm asking you about a  
4 specific case back in May of 2006, did there come a  
5 time you were assigned to represent a man named General  
6 Waiters?

7 A Yes.

8 Q Do you see Mr. Waiters in court today?

9 A Yes.

10 Q The gentleman sitting next to me in the  
11 white shirt?

12 A Yes.

13 Q At what point in the case were you  
14 assigned to represent Mr. Waiters, as best as you can  
15 recall?

16 A It was -- I believe it was May 17, 2006,  
17 and I received it I believe it was in part 10, who was  
18 Judge Walsh at the time.

19 Q Would you agree with me that you were  
20 assigned at the initial proceeding, he was brought into  
21 court and arraigned on this Indictment 3464 of 2006?

22 A Yes.

23 THE COURT: And certainly, if you need to  
24 refresh your recollection, Mr. Simons, you'll let the  
25 Court know and I'll give you an opportunity to do that.

1 MR. FARRELL: Your Honor, I'd ask that the  
2 witness be shown what's already admitted for purposes of  
3 this hearing as Defendant's A in evidence.

4 Q Mr. Simons, have you had a chance to look  
5 at those documents?

6 A Yes.

7 Q Looking at the first page, do you  
8 recognize it?

9 A Yes.

10 Q What is it?

11 A The first page appears to be -- it's a  
12 subpoena that I signed.

13 Q That you prepared and had Judge Dowling --  
14 had submitted to Judge Dowling for her signature to  
15 obtain the records of your then-client General Waiters;  
16 correct?

17 A Yes.

18 Q And that subpoena was dated within two  
19 weeks of your initial appearance on the case, June 2nd,  
20 2006; correct?

21 A It's dated June 2nd, 2006.

22 Q And could you tell us, Mr. Simons, why was  
23 this one of the first things that you did in connection  
24 with the representation of Mr. Waiters, subpoenaing  
25 those records?

1           A     Why I subpoenaed the records?

2           Q     Yes.

3           A     I reviewed and subpoenaed everything.  If  
4 specifically that was the first thing I did, I'm not  
5 sure if it was the first thing I did, but it was one of  
6 many things that I did.

7           Q     I totally agree with that.

8                     If you could tell us why these records,  
9 though, did you believe they were important or could  
10 potentially be important to the case?

11          A     Yes.  I subpoenaed almost everything I  
12 could subpoena involving Mr. Waiters.

13          Q     Now, once you received these records,  
14 Mr. Simons, did there come a time that you reviewed  
15 them?

16          A     Yes.

17          Q     Now, Mr. Simons, I'm not trying to be  
18 facetious, but do you have any medical training  
19 yourself?

20          A     No.

21          Q     Were you a science major in college?

22          A     No.

23          Q     Prior to this case, had you ever had  
24 occasion to review medical records before?

25          A     Yes.

1           Q     Prior to this case, meaning being assigned  
2     to represent General Waiters, did you ever engage an  
3     expert such as a medical doctor to assist you in the  
4     review of medical records?

5           A     Yes.

6           Q     Do you recall who that was, who you used  
7     and for what case and when that was?

8           MR. HALE: I'm going to object as to relevance.

9           THE COURT: Sustained. Don't answer.

10          MR. FARRELL: If I could, Judge, I know you  
11     don't take argument, with all respect, I do think in a  
12     hearing like this I think it would be fair to give us a  
13     little leeway with respect to the core issue here, which  
14     is about the use of an expert, Judge, in this case.

15          THE COURT: Well, certainly it's about the use  
16     of an expert in this case, not about experts as used in  
17     other cases, so I'm sustaining the objection.

18          MR. FARRELL: Understood, your Honor.

19          Q     With respect to this case, Mr. Simons, you  
20     did ask and received approval from her Honor, Justice  
21     Dowling, to gain the assistance of the Walker  
22     Investigative Agency to assist you with the case;  
23     correct?

24          A     Yes.

25          Q     And you did ask for and again receive

1 approval from Justice Dowling to get the assistance of  
2 Dr. Sanford Drob, a noted forensic psychologist, with  
3 respect to this case; correct?

4 A Yes.

5 Q Mr. Simons, would you agree with me that  
6 you never asked Justice Dowling to have a medical  
7 doctor assigned to assist you with the review of  
8 records in this case?

9 A I never asked, that's correct.

10 Q And you never asked her for a certified or  
11 I should say registered nurse who has experience in  
12 reviewing medical terms, you never asked for a nurse to  
13 be assigned to assist you?

14 A I never asked her. I used one, but I  
15 never asked.

16 Q So it's your testimony that you had a  
17 medical doctor that you paid privately to assist you in  
18 this case?

19 A No. I had a medical doctor I did not have  
20 to pay.

21 Q Is it a friend or a relative?

22 A My father is an internist, my brother is a  
23 trauma surgeon, my mother is a nurse, registered nurse,  
24 and I believe one of the investigators is also a nurse.

25 Q When you say "one of the investigators,"

1       you mean somebody from Walker?

2               A       Yes.

3               Q       So it's your testimony that you used these  
4       relatives to assist your reading of these records; is  
5       that it?

6               A       Yes.

7                       MR. FARRELL: Your Honor, I would ask now,  
8       based on that testimony, for a little leeway to ask the  
9       question: Did you ever use any of those relatives to  
10      testify on any case you've ever had?

11              A       I believe I did in -- I would have to  
12      check my notes, but I think a long time ago I did have  
13      one of my relatives, he might have testified. I don't  
14      remember.

15              Q       And you answered the question and you were  
16      allowed to answer the question that you had previously  
17      used an expert through the Assigned Counsel Plan to  
18      assist you as well to review records on another case;  
19      isn't that correct?

20              A       I have done that too, yes.

21              Q       Okay. And you had -- did that person,  
22      whoever it was, testify at the trial -- at a trial?

23              A       As a medical person, I don't think so. I  
24      don't know. I'd have to check my files.

25              Q       I'm sorry. Did you finish your answer?

1 A Yes.

2 Q For those cases that you did use an  
3 Assigned-Counsel-Plan expert, were your  
4 family unavailable to help you, those that are skilled  
5 in the medical profession?

6 MR. HALE: Objection, your Honor.

7 THE COURT: Sustained. Don't answer.

8 Q With respect for not asking Judge Dowling  
9 for the assistance of an approved expert from the  
10 Assigned Counsel Plan, did you have a strategic reason  
11 for not doing that?

12 MR. HALE: Objection.

13 THE COURT: I'll overrule it.

14 A A strategic for not?

15 Q Requesting an expert from the Assigned  
16 Counsel Plan in this case, the case of People versus  
17 General Waiters, did you have a strategic reason for  
18 not asking for an expert from the Assigned Counsel  
19 Plan?

20 A Well, from what I remember, I did  
21 request -- I think I did request Dr. Drob, who is an  
22 expert.

23 Q But he's a forensic psychologist, he's not  
24 an M.D., would you agree with that?

25 A Well, he's a psychologist, yes.



1 Q Right. He's not a medical doctor;  
2 correct, you agree with that?

3 A He has medical training, his medical  
4 training to the extent he's a psychologist.

5 Q We would agree he's a psychologist?

6 THE COURT: Allow him to finish his answer.

7 A I think he does have to go to medical  
8 school, I think. I don't know his specific training,  
9 but, um, he was there. And like I told you, my father  
10 is an internist and my brother is a surgeon, so I've  
11 consulted them on this and many cases.

12 Q Would you agree the reason you had Judge  
13 Dowling appoint Dr Drob is for his expertise as a  
14 psychologist, is that fair to say?

15 A Yes. And I had used Dr Drob before, and  
16 I've also used Dr Drob and there was another doctor,  
17 Dr. Berger, at the same time on another case.

18 Q Another case?

19 A I used them both on the same case before.

20 Q But not the Waiters' case?

21 A Not the Waiters' case.

22 MR. FARRELL: I'd ask this be marked or deemed  
23 marked, your Honor, as Defendant's B for identification,  
24 and shown to the witness.

25 THE COURT: It will be marked as B and shown to

1 the People.

2 MR. HALE: No objection.

3 MR. FARRELL: Thank you.

4 I'm going to offer it without objection then as  
5 Defendant's B for purposes of the hearing.

6 THE COURT: What's been marked as Defendant's B  
7 will be in evidence on consent.

8 MR. FARRELL: And now shown to the witness.

9 We can put it up on the screen. That's great,  
10 Officer. Thank you.

11 Q Mr. Simons, if you want to look at this at  
12 the desk, please let me know. I'm doing my best with  
13 this.

14 This is an order signed by Judge Dowling,  
15 it looks like on July 3rd, 2006?

16 THE COURT: That's 5th.

17 MR. FARRELL: Thanks, Judge.

18 Q July 5th, 2006. Would you agree with me  
19 this is an order you had prepared to have Dr. Drob, a  
20 qualified, New-York-State-licensed psychologist, and  
21 that these are -- this is an order to permit  
22 psychological examination; correct?

23 A Yes.

24 Q And you prepared to have Waiters examined  
25 for psychological examination and testing; correct?

1 A That what's the order says.

2 Q That's the way you worded it?

3 A That's what the order says.

4 Q Okay. I know it was a long time ago,  
5 Mr. Simons. Can you tell us as you sit here today, how  
6 many hours, if it can be measured in hours, the time  
7 you spent reviewing the medical records that are  
8 admitted at this hearing?

9 A Specifically?

10 Q Yes, if you could.

11 A I couldn't. I would have to check. I  
12 don't know. I'm sure it was a lot, but --

13 Q Okay. Fair enough.

14 I'm going to show you some specific pages  
15 of the records admitted into evidence, Mr. Simons, and  
16 ask you a few questions about them.

17 This is page 4 of Exhibit A, can you tell  
18 us what that means to you, Mr. Simons?

19 A Today? You want to know what it means  
20 today?

21 Q Yes. If you understand, can you tell the  
22 Court what does this mean, this notation?

23 A E.T.O.H., from my memory, I think it has  
24 to do with alcohol.

25 Q Page 5, this is tough to read, I don't

1 know if you can make it out, Mr. Simons. If you have  
2 the -- I'm using a copy to make it easier, if you could  
3 look at page 5 of the exhibit.

4 THE COURT: It's right there.

5 Q The third line. The numbers are at the  
6 bottom. The third line down during the "Treatment  
7 Response Section," middle of the third line.

8 THE COURT: Give him an opportunity to locate  
9 it.

10 When you have, just indicate that, Mr. Simons.

11 A You said page 5?

12 Q Yes.

13 A Are you counting the first page?

14 Q Yes. The subpoena is page 1. There  
15 should be a number 5 at the bottom.

16 A Okay. What are you looking at?

17 Q You see the word "confused"?

18 A "Confused," right.

19 Q The word after it, or the notation after  
20 it?

21 A Is that an "S.T.S."?

22 Q Correct. What's the next two words, what  
23 do they mean to you?

24 A E.T.O. -- it looks like "E.T.O.H. intake."

25 Q Yes. My question is: What does that mean

1 to you?

2 A Today I couldn't answer that. I could  
3 answer it then when I consulted with my experts, but  
4 today --

5 Q As you sit here today, Mr. Simons, I know  
6 it was a long time ago, do you have a specific  
7 recollection of the consultation with you and your  
8 experts concerning page 5 of the record and what, if  
9 any, significance that notation "E.T.O.H. intake" may  
10 have had to this case?

11 A Put it this way, I know I consulted with  
12 various people regarding everything on the record. I  
13 can't tell you today, and I'm not going to try to  
14 guess.

15 Q Okay. Page 6 of the records, last page,  
16 last notation on the page, "C.N.S.: Unable to assess  
17 due to intoxicated state," that's pretty clear. As you  
18 sit here today, or based upon your recollection of your  
19 consultations with your experts, can you tell us what  
20 "C.N.S." means?

21 A As I say, today I can't tell you.

22 Q Okay. Top of the page there's some  
23 abbreviations "L.O.C." and "A.O.B.," can you tell us  
24 what either of those mean?

25 MR. HALE: Your Honor, I'm going to object and

1 if I could ask the witness to step out for a moment just  
2 so I can make a record.

3 THE COURT: Certainly. Have him step in the  
4 back hall.

5 (Whereupon, the witness exited the courtroom.)

6 MR. HALE: Your Honor, in terms of asking the  
7 witness what his present memory of these particular terms  
8 means are, one, I don't know that it's particularly  
9 relevant, but two, this is going over items that were in  
10 fact admitted into evidence to the jury upon Mr. Simons'  
11 application at the time of trial. This isn't things that  
12 were excluded by the Court or necessarily needed any sort  
13 of explanation. And remembering that Mr. Simons both had  
14 these items admitted and received the intoxication charge  
15 from the Court, so I don't know that any of this is  
16 relevant whatsoever.

17 MR. FARRELL: Judge, if I may, you, after  
18 extensive argument, and I'm going to get to that, after a  
19 25-page colloquy when Mr. Simons attempted to admit these  
20 records en masse without an expert witness, the Court,  
21 after hearing strenuous objection from Mr. Hale, admitted  
22 two lines on two -- there were two pages of those records  
23 admitted. That's it. It's not this part. "L.O.C." and  
24 "A.O.B." were not admitted to the jury, and Mr. Hale made  
25 an argument that the Court found compelling at the time

1 that it would be unfair to admit medical terminology  
2 without someone to explain it, and I totally understand  
3 that, and I respect the Court's ruling on that.

4 But for this hearing, the gravamen of our claim  
5 is Mr. Simons, on no less than five occasions you  
6 strongly suggested to the defense attorney, Mr. Simons,  
7 that he should get a doctor in here and then you would  
8 let all those records in.

9 So I think this is fair questioning to probe  
10 the witness' memory on his claim that he discussed these  
11 records in great detail with family members that are  
12 doctors, and I'm sure that's true, so I think it's fair  
13 examination.

14 I don't plan to go through every record. I  
15 have a few more questions about some records that I  
16 believe are significant that the jury definitely did not  
17 see, and then I'm going to move on.

18 MR. HALE: That's already part of the record.  
19 I don't know what going and asking what does this mean,  
20 what does it mean to you now, what did it mean to you  
21 then, I don't know that it's relevant whatsoever to the  
22 issue.

23 You know, it's part of the record that he asked  
24 for these to be brought in, it's also part of the record  
25 that the Court would not admit some of the items without

1 explanation by an expert. The expert obviously testified  
2 yesterday, for whatever worth the explanations are. This  
3 just seems to be -- it doesn't seem to be relevant to  
4 keep asking him what his recollection is and whether he  
5 asked these particular things to be admitted. He asked  
6 for everything to be admitted. It's part of the record.

7 THE COURT: Certainly without more I'm going to  
8 sustain the objection. Certainly it would be relevant as  
9 to why he decided not to have -- to call the doctor.

10 MR. FARRELL: I got it, Judge. I can move on.

11 THE COURT: That's relevant, okay, but  
12 certainly as to the individual terms, I'm sure if you  
13 asked me about some of the terms, I wouldn't recollect if  
14 in fact it was brought out, or certainly whether it's a 3  
15 or a 5. I could tell, certainly nobody else can tell.

16 MR. FARRELL: I get it, Judge. I'm going to  
17 move on then. I understand the Court's ruling. I  
18 respectfully except.

19 THE COURT: Your exception is noted for the  
20 record.

21 A COURT OFFICER: Witness entering.

22 (Whereupon, the witness resumed the stand.)

23 THE COURT: Mr. Simons, I'm going to remind you  
24 you're still under oath. You're still sworn to tell the  
25 truth.



1 DIRECT EXAMINATION

2 BY MR. FARRELL: (Cont'd)

3 Q Mr. Simons, back in 2006 and 2007, based  
4 on your review of the records, your own review,  
5 together in consultation with your brother and your  
6 father, would it be fair to say that you believed that  
7 those records showed that General Waiters was very  
8 drunk when he was taken into Kings County Hospital on  
9 the morning of this tragic shooting, the afternoon,  
10 around noontime, whatever it was?

11 A It's my understanding, 'cause I haven't  
12 reviewed this in years --

13 Q Understood.

14 A (Cont'g) -- that he was intoxicated.  
15 Whether it was very drunk or not, you know, that's a  
16 different issue.

17 MR. FARRELL: Okay. Based on that answer, your  
18 Honor, I'd ask for a little leeway with respect to one  
19 more document.

20 Q Page 119 of the medical records there's a  
21 reference, this was the blood alcohol, the actual blood  
22 alcohol taken at 12:33 P.M., Mr. Simons, and the  
23 reading was 386.24 (C.R.I.T.). Do you recall that  
24 document, and do you recall actually arguing to Judge  
25 Dowling that the jury should see this because it shows

1 the defendant's level of intoxication?

2 A Offhand, like I said, I haven't read the  
3 minutes. If it's in the trial minutes, I stand by  
4 whatever I said during the trial minutes. I haven't  
5 seen it. No one showed it to me. No one told me what  
6 this is about. So if it's in the trial minutes, I'll  
7 stand by that.

8 Q And I totally respect your recollection  
9 from ten years ago is what it is, but I have to ask, as  
10 you sit here today, do you recall noticing or being --  
11 having this being brought to your attention by anyone  
12 you consulted with in this case that this level is  
13 essentially five to six times the legal limit for  
14 driving of alcohol, that that's what it is, did you  
15 know that at the time?

16 MR. HALE: Objection.

17 THE COURT: I will sustain it as to the form.

18 Q Mr. Simons, did anyone that you consulted  
19 with bring it to your attention that this is considered  
20 an extreme level of intoxication?

21 A As I said, it sounds like I made an  
22 argument, and it's in the minutes, it's in the record,  
23 and, um, like I said, I haven't seen it. No one showed  
24 it. You can refresh my recollection with the minutes,  
25 otherwise I will stand by whatever I said back then

1 when it was fresh in my mind, 'cause I can't remember  
2 everything offhand now.

3 Q Does seeing this record in any way refresh  
4 your recollection that based on your own review of the  
5 records and as you've already testified, your extensive  
6 discussion with medical professionals, does it refresh  
7 your recollection that you knew or had reason to know  
8 that waiters was very intoxicated when he was taking to  
9 K.C.H.?

10 A Okay. There's -- I was aware of the  
11 records. I had a conversation with Mr. Waiters and I  
12 know what Mr. Waiters said and I know what everyone  
13 else said. So my argument was based on -- and I did  
14 factor in things that he said specifically.

15 Q So you're leading up to my next question.  
16 Thank you.

17 Did you ever discuss with Mr. Waiters the  
18 significance of the blood alcohol level found within  
19 those records?

20 A And I guess for the record, I am -- I can  
21 only assume and ask the Court that he waived his  
22 attorney-client privilege?

23 MR. FARRELL: Judge, I believe he can answer.

24 THE COURT: Certainly he has by indicating  
25 ineffective assistance of counsel.

1 MR. FARRELL: I'd agree with that, for the  
2 record.

3 A I discussed this with Mr. Waiters a lot.  
4 The problem is his response, and I can tell you his  
5 response was he was not drunk, he was not drinking that  
6 day, or I think he had a drink early in the day and he  
7 was -- I think he mentioned he was recovering. He had  
8 drank the night before, but he informed me that he was  
9 not -- did not feel drunk at all.

10 Q And Mr. Simons, that's your testimony  
11 based upon your recollection of ten years ago, that you  
12 remember clearly that waiters told you what you just  
13 testified to?

14 A Well, I took notes.

15 Q Right. And you have those with you today?

16 A Yes, I do.

17 MR. FARRELL: I would ask that they be  
18 produced, your Honor. If we take -- I don't know how the  
19 Court would like to do it. I would -- I think in  
20 fairness, both sides would like a copy of them. We can  
21 take a brief break for them to be copied, or I certainly  
22 have material to work through and we can get them later.

23 MR. HALE: I don't think that's necessary. If  
24 he needs to refresh his recollection from his notes --

25 MR. FARRELL: I think now he's testifying in

1 large part based upon his memory, which he said needs to  
2 be refreshed. I think in fairness we should have a copy  
3 of them.

4 THE COURT: Certainly you're not entitled to a  
5 copy of his notes.

6 MR. FARRELL: Well, if that's the Court's  
7 ruling, of course I respect it. I do think it's not  
8 unfair and it could be probative and relevant to the  
9 whole nature of the hearing.

10 I mean, he turned over his file to me, he  
11 didn't turn over those notes that he has, and I think he  
12 should. That's my request.

13 THE COURT: He's not required to turn over the  
14 notes.

15 Q Mr. Simons, where did you have --

16 THE COURT: In the audience, counsel, I'm  
17 talking to Mr. Trabulsi, don't hold your conversations in  
18 here.

19 MR. FARRELL: May I continue, Judge?

20 THE COURT: Yes, please.

21 MR. FARRELL: Thank you.

22 Q Mr. Simons, can you recall when that  
23 conversation took place that you just told us about?

24 A If I can check my notes I can.

25 THE COURT: Certainly, with the Court's

1 permission.

2 A Okay. I'm looking for the date. I talked  
3 to Mr. Waiters I think it was in '06. It might have  
4 been one of the initial conversations, but as we were  
5 talking, I took notes.

6 Q Understood.

7 A And I wrote down --

8 Q As you sit here today, I know it was a  
9 long time ago, did this conversation take place at  
10 Riker's Island where he was housed, did it take place  
11 in the courthouse, on a video conference?

12 A This particular one for some reason I  
13 didn't put the location and time. It probably occurred  
14 either while he was incarcerated or video. I don't  
15 remember which one.

16 Q As you sit here today, do you recall  
17 visiting him at Riker's Island during the course of the  
18 two-year pendency of the case?

19 A No. I did not visit him at Riker's  
20 Island. I don't believe so.

21 Q So would it be fair to say you either  
22 spoke to him in this building personally on the third  
23 floor or via video conference on the fourth floor?

24 A Yes.

25 Q And is it your testimony that he had --

1 that it was Waiters that initiated, that it wasn't in  
2 response -- I'll withdrawal that. It's a bad question.

3 It's your testimony that Waiters told you  
4 when you asked him about that morning, he told you he  
5 wasn't drinking, is that your testimony?

6 A No. During one of our conversations I  
7 believe he stated that he had, um, the evening before,  
8 12 o'clock, he had I think it was five cups of Bicardi  
9 Light and Pepsi and I believe he said he was tipsy and  
10 he was not drunk. And then that morning I think during  
11 one of my conversations with him they had one cup at 8  
12 A.M., they were drinking. He was drinking with I  
13 believe Miss Mary and they had one cup.

14 Q That's what General Waiters told you?

15 A Yes, on that occasion.

16 Q Were there other occasions that he told  
17 you he had way more to drink than that or any more to  
18 drink than that, I should say?

19 A Let me see. You're talking about the  
20 morning?

21 Q Yes, the morning.

22 Just so we're clear, you'd agree the night  
23 before was his birthday, May 6th, and there was a party  
24 for him at the apartment, the apartment of the tragic  
25 shooting?

1 A Well, that's what he told me.

2 Q That's what several witnesses testified to  
3 under oath at the trial as well; right?

4 A Probably. Like I said, I don't remember  
5 all the details. If it's in the minutes, I'm not going  
6 to disagree with what's in the minutes.

7 Put it this way, I don't remember it. I'm  
8 checking my notes. I don't see --

9 Q Let me ask you this, Mr. Simons: After  
10 Waiters told you that, did you confront him with the  
11 fact that medical records suggest that he was four or  
12 five times as drunk as the law allows in New York to  
13 drive a car at the time he was admitted?

14 MR. HALE: Objection.

15 THE COURT: Sustained. Don't answer.

16 Q Mr. Simons, by the way, did you ever give  
17 Waiters a copy of his medical records --

18 MR. HALE: Objection.

19 Q (Cont'g) -- at any time prior to the  
20 trial?

21 MR. FARRELL: That's a fair question.

22 THE COURT: Let me decide, Mr. Farrell.

23 MR. FARRELL: You got it. I'm sorry.

24 THE COURT: Overruled.

25 A I gave Mr. Waiters a lot of his reports.



1 I think I gave it to him. I don't remember  
2 specifically, but I know I routinely gave him his  
3 documents. I don't know specifically if he had the  
4 medical records or not.

5 Q Okay. As you sit here today, and I know  
6 it was a long time ago, do you have a recollection of  
7 discussing the medical records, specifically the blood  
8 alcohol level contained in there, with Mr. Waiters at  
9 any time prior to the trial?

10 A All -- I remember discussing everything  
11 with Mr. Waiters, the whole case. The whole --

12 Q I understand that.

13 A (Cont'g) -- thing.

14 Q I'm asking you about a specific issue,  
15 namely what the medical records suggested in terms of  
16 how intoxicated he appeared to the medical people, did  
17 you ever discuss that with him?

18 A I'm sure I did. I mean, I can't remember  
19 specifically each element, but we discussed everything.

20 Q Did you discuss with him the fact that  
21 your investigator, Mr. Walker, obtained a statement  
22 from Jacqueline Warren just weeks after this tragic  
23 shooting where she said that at 8:30 A.M. General  
24 Waiters started sipping liquor again. He had about a  
25 pint by himself? Do you remember getting that

1 statement sent to you from Mr. Walker, your  
2 investigator?

3 A I don't. If it's in the file, if I gave  
4 it to you and it's there --

5 Q Right.

6 MR. FARRELL: I'm going to ask it be deemed  
7 marked. I'll show it to the prosecution and then show it  
8 to the witness to see if it refreshes his recollection.

9 MR. HALE: Your Honor, again, this is part and  
10 parcel of what Miss Warren testified to during the trial.  
11 There's no dispute as to that, so I don't know how this  
12 is at all relevant.

13 MR. FARRELL: Again, that's not accurate. At  
14 the trial she never said he drank a pint of liquor. I  
15 can tell you that because I read the record a few times.  
16 She wouldn't commit to anything other than he was  
17 drinking, and I'm going to ask questions about that  
18 later.

19 THE COURT: Is there still an objection?

20 MR. HALE: There's still an objection, your  
21 Honor.

22 THE COURT: I'm going to sustain the objection.

23 MR. FARRELL: Judge, with all respect --

24 THE COURT: I'll have it marked for  
25 identification purposes.

1 MR. FARRELL: I didn't offer it in evidence. I  
2 just wanted, in fairness, I like to show things to my  
3 adversary before I have them shown to the witness.

4 THE COURT: As I said, I'll mark it for  
5 identification.

6 MR. FARRELL: My purpose was not to admit it,  
7 just to show it to this witness to see if it refreshes  
8 his recollection because he said I'm not sure what was in  
9 there. He didn't doubt me, he's not suggesting I'm  
10 making up documents, but it's fair to the witness. He  
11 should see the document, Judge, and it should refresh his  
12 recollection that that's what the statement was, that he  
13 drank a pint, from the witness.

14 THE COURT: I'll have it marked for  
15 identification purposes, but my ruling is still the same.  
16 I'm not going to have him look at the document. It's  
17 marked so it preserves the record, but I'm not going to  
18 have it shown to the witness.

19 Q Do you ever recall having a conversation  
20 with General Waiters about the fact that there were  
21 people at the party that stated he was very intoxicated  
22 that morning, that in fact that he was drinking that  
23 morning, did you ever ask him about that? Because it  
24 would be so inconsistent with what you claim he said,  
25 that he wasn't drinking at all?

Defense Witness-Simons-Direct/Farrell

1 MR. HALE: I object to the question.

2 THE COURT: Sustained only as to the form.

3 Q Do you recall having any conversations  
4 with Mr. Waiters about the fact that there were  
5 witnesses who had given statements to the effect that  
6 he was drinking that morning, not just the night before  
7 but that morning also?

8 A You know, I remember having conversations  
9 with Mr. Waiters and just informing him that maybe some  
10 of the witnesses were saying things differently than  
11 what he was saying. Specifically that, I mean, we  
12 discussed everything. But I do remember letting him  
13 know there were some witnesses who were not agreeing  
14 with some of the things that he was saying.

15 Q Mr. Simons, did you ever suggest to  
16 Mr. Waiters that it would benefit him to state that he  
17 was not drinking on the morning of the shooting?

18 MR. HALE: Objection.

19 THE COURT: I'm going to overrule.

20 A No. I didn't suggest for him to state  
21 anything.

22 Q What was the purpose in engaging Dr. Drob  
23 to assist you in the defense of General Waiters?

24 A Because when I got the case, and just so  
25 you know, I was on the capital panel so --

1 Q As was I, sir.

2 A (Cont'g) -- all that training, you  
3 investigate everything. So this was something that  
4 became an issue, and we investigated that, and many  
5 other things, so.

6 Q Mr. Simons, in your dealings with  
7 Mr. Waiters, did you find him to be a somewhat limited  
8 individual mentally?

9 MR. HALE: Objection.

10 THE COURT: Sustained.

11 Q How would you describe General Waiters'  
12 intelligence in your dealings with him?

13 MR. HALE: Objection.

14 THE COURT: Sustained. Don't answer.

15 Q Do you recall actually serving psychiatric  
16 notice in this case upon the People and filing such  
17 with the Court that you were going to present a  
18 psychiatric defense at trial?

19 A I believe I did file. I'm sure it's in  
20 the file, but.

21 Q And in fact, the evidence, the notice you  
22 filed was challenged by the prosecution as being  
23 insufficient, and then you amended the notice shortly  
24 before the trial in February of 2008, do you recall  
25 that?

1 A Probably.

2 Q Was your defense extreme emotional  
3 disturbance, Mr. Simons; is that what you were planning  
4 to proffer at the trial, the affirmative defense of  
5 extreme emotional disturbance?

6 A Um, at the trial the plan was to call Dr.  
7 Drob and the plan was Mr. Waiters was going to testify.  
8 Both of them would testify. And throughout the trial,  
9 you know, as things went, Dr. Drob, I did not call Dr.  
10 Drob, and Mr. Waiters refused to testify.

11 Q So it's your testimony now that it was  
12 only at the trial that you decided not to call Dr.  
13 Drob?

14 A It's my recollection I believe Dr. Drob's  
15 name was on the witness list.

16 Q And again, the question is as simple as I  
17 can make it: Is it your testimony that at the trial  
18 during May of 2008, is that when you decided that it  
19 would not be helpful to the defense to call Dr. Drob?

20 A Yes, during the trial.

21 MR. FARRELL: I'd ask this be marked,  
22 previously shown to the People, marked as Defendant's D  
23 for identification, and shown to the witness.

24 THE COURT: The letter D, as in David.

25 MR. FARRELL: D, as in dog.

Defense Witness-Simons-Direct/Farrell

1 THE COURT: I said D, as in David.

2 MR. FARRELL: Thanks, Judge.

3 A COURT OFFICER: Show Defense D to the  
4 witness?

5 THE COURT: Show it to the witness, yes.

6 A Okay.

7 Q Are you familiar with that, Mr. Simons?

8 A Yes.

9 Q In fact, isn't it a letter written by you  
10 to your then client General Waiters back in October of  
11 2007 where you stated that after reviewing the reports  
12 of both doctors, your -- this is you writing to  
13 Waiters, "your extreme emotional disturbance defense  
14 will be difficult, and Dr. Drob may not be able to  
15 testify in your behalf," isn't that the words you chose  
16 to write to your client several months before the trial  
17 unfolded?

18 A Yes, that's in the letter.

19 Q And that's what you believed, that this  
20 wasn't a viable defense, extreme emotional disturbance?

21 A I didn't say that.

22 Q You didn't say it in those words, but  
23 weren't you alluding to the fact that when you said  
24 that it would be difficult and Drob may not be able to  
25 testify, could you explain what you meant by your use

1 of those words?

2 A I had -- I was consulting with Dr. Drob  
3 and during my consultation with Dr. Drob it's my  
4 understanding he did not really believe he was going to  
5 be able to help Mr. Waiters. He thought his testimony  
6 may actually hurt more than it would help.

7 MR. FARRELL: Judge, for the record, since it's  
8 been authenticated by the witness I'd offer Defense D in  
9 evidence.

10 THE COURT: Any objection?

11 MR. HALE: No.

12 THE COURT: Defendant's D will be in evidence.

13 A COURT OFFICER: So marked, your Honor.

14 THE COURT: You can put it on top of the  
15 defendant's exhibits. There should also be B there, the  
16 order for psychological testing.

17 Do you still have that exhibit, counsel?

18 MR. FARRELL: Yes, Judge. I'm sorry.

19 THE COURT: That should be handed to the court  
20 officer.

21 MR. FARRELL: Yes, it should be.

22 Could I have D so we can put it on the screen,  
23 Officer, when you can?

24 Q And further, Mr. Simons, you would agree  
25 that you wrote: "The defense is difficult because of



1 the statement of all the witnesses is that Lorenzo did  
2 not threaten you before the shooting. Your testimony  
3 may be the only evidence of a treat," -- I'm sure you  
4 meant "threat," -- "and if the jury does not believe  
5 you, then you will probably be convicted."

6 And that's what you believed at the time  
7 you wrote the letter; right, that statement?

8 A I wrote the letter.

9 Q Right.

10 A That's what's in the letter.

11 Q Okay. That's enough about the letter.  
12 It's in evidence.

13 Once you served notice that Dr. Drob may  
14 testify, would you agree -- do you recall that the  
15 People, as was their right, engaged a mental health  
16 professional on their own to interview General Waiters,  
17 Alexander Sasha Barday, do you recall that, Mr. Simons?

18 A I believe -- I think you're correct.

19 Q And do you recall if you attended that  
20 interview, meaning the interview of General Waiters by  
21 the D.A.'s doctor, Dr. Sasha Barday?

22 A That I don't remember. I'm not sure. I  
23 don't think so, but I don't remember.

24 Q You realize under the statute you have an  
25 absolute right to be present for that interview, though

1 it's not required, you know that; right?

2 A Yes.

3 Q And as you sit here today, you're not sure  
4 if you attended or not?

5 A Right. I don't remember.

6 Q Mr. Simons, you recall reviewing Dr.  
7 Barday's report based upon his examination of the  
8 relevant documents and his interview with Mr. Waiters;  
9 correct?

10 A Yes.

11 Q Do you recall him noting that Mr. Waiters  
12 had been consuming alcohol for a substantial period of  
13 time prior to the incident and was intoxicated at the  
14 time he shot the victim, do you remember that  
15 conclusion by Dr. Barday?

16 A I mean, I have to look at his report, if  
17 it's in the report, because I did read the report.

18 Q And you're not challenging my reading of  
19 the report?

20 A Well, I don't --

21 Q Do you want to see the report?

22 A I mean, I think I may have a copy. If  
23 it's in the report --

24 Q Page 15.

25 A If it's in the report and you read it

1 accurately, then it's correct.

2 Q Okay. Did you find that disturbing,  
3 Mr. Simons, that after General Waiters, according to  
4 you, stated that he wasn't drinking that morning, that  
5 the D.A.'s expert would come out with a conclusion that  
6 Waiters was in fact intoxicated at the time he shot the  
7 victim?

8 MR. HALE: Objection.

9 THE COURT: Sustained. Don't answer.

10 Q Is it your testimony, Mr. Simons, as you  
11 sit here today, as far as you know, General Waiters  
12 never told you that he was drunk on the morning of the  
13 shooting from drinking continually through the night of  
14 his birthday party up to and including waking up at  
15 Kings County Hospital, he never told that to you?

16 A I remember him saying him drinking and I  
17 think he might have gone to sleep at 12 or something  
18 and then he woke up and he, you know -- I have to check  
19 his notes. He might have said he had a drink and then  
20 he wasn't -- he informed me he wasn't intoxicated.

21 Q Okay. Let's fast forward now to the  
22 trial, the People of the State of New York versus  
23 General Waiters, May, 2008, before her Honor, the  
24 Honorable Deborah Dowling, Calvin Simons for the  
25 defense, what was your defense going into the trial?

1           A     I'm sure if you look at the record and I  
2     guess my opening statement may say something of what  
3     the defense was, and --

4           Q     Well, do you believe that, as you sit here  
5     today, that you laid out a defense in your opening  
6     statement?

7           A     I don't know. I don't remember.

8           MR. FARRELL: I'm going to ask that this be  
9     marked my next number, please, your Honor.

10          THE COURT: E, as in Eddie, for identification  
11     purposes.

12          MR. FARRELL: Thank you.

13          Q     While the officer is marking that,  
14     Mr. Simons, before openings, as we both know, voir dire  
15     is an important part of a trial. Do you recall the  
16     theme of your voir dire in the People versus General  
17     Waiters?

18          A     No, I don't.

19          Q     I mean, I've seen you, for example, in a  
20     case many, many years ago when I was a prosecutor, and  
21     you prevailed at a misidentification trial. You voir  
22     dired extensively, from the moment you got up to the  
23     moment you summed up, that was your theme, mis-  
24     identification. Did you have a theme during this voir  
25     dire?

1 MR. HALE: Objection.

2 THE COURT: Sustained. Don't answer.

3 Certainly, the exhibit has been marked as E.

4 Do you wish to have that shown to the witness?

5 MR. FARRELL: Yes. I ask it be admitted  
6 hopefully without objection as to the opening statement  
7 of Mr. Simons in the People versus General Waiters.

8 MR. HALE: That's fine.

9 THE COURT: No objection, so what has been  
10 marked Defendant's E will be in evidence.

11 Q Okay. Please take a moment, Mr. Simons,  
12 it's about two pages, your opening, transcribed, so it  
13 shouldn't take more than that, but please have a look  
14 at it.

15 A Do you want me to read it?

16 Q Read it to yourself. It's in evidence, I  
17 guess.

18 Would you agree that your opening  
19 statement did not set forth a defense of extreme  
20 emotional disturbance or intoxication? In fact, you  
21 spent the little time you spent talking about the fact  
22 that no one -- that Mr. Waiters did not intend to kill  
23 the little girl or to shoot Miss Clark or to shoot Miss  
24 Lewis, that's pretty much all you said, would you agree  
25 with that?

1 A Well, the opening speaks for itself, so.

2 Q Okay. Would you agree that it didn't  
3 speak too loudly or clearly in terms of any defense,  
4 did it?

5 MR. HALE: Objection.

6 THE COURT: Sustained.

7 And certainly it's in evidence for the Court.

8 Q Let me ask you this, Mr. Simons: Did you  
9 understand the People's theory of their case, that this  
10 was a transferred intent case, that they weren't  
11 suggesting that Waiters tried to kill the young girl or  
12 to injure Mary Lee Clark or to injure Shantasia Lewis,  
13 did you understand that?

14 MR. HALE: Objection. It's outside --

15 THE COURT: Sustained.

16 MR. HALE: If I may for just a moment, your  
17 Honor, there's a specific scope to this hearing, which  
18 was on the application of counsel. This is way outside  
19 this scope.

20 MR. FARRELL: Judge, I.A.C., ineffective  
21 assistance of counsel, encompasses the whole of the case.  
22 There's no scope. The People consented to a hearing.  
23 The scope is I.A.C. for the case, for the representation,  
24 and certainly, respectfully, an opening statement is part  
25 of that. It's counsel's conduct from the beginning time

1 where he meets the client, his preparation for trial and  
2 the trial itself.

3 So I think I'm not going to belabor the point,  
4 I plan to move on, I think that was a fair question.

5 MR. HALE: Your Honor, there's specific  
6 allegations of ineffective assistance of counsel. That  
7 was the basis for the Court granting the hearing, on the  
8 specific allegations. It's not just oh, it's ineffective  
9 assistance of counsel, anything goes.

10 THE COURT: Certainly what the law says is that  
11 there is a standard and whether in fact the conduct of  
12 the attorney fell below that standard. So it's not an  
13 entire review, but certainly it is a review by the Court  
14 of whether in fact the defense fell below the standard  
15 that is required by law.

16 Q Mr. Simons, again, during this -- after  
17 your opening, what was your -- what was your goal; what  
18 were you trying to accomplish by your cross examination  
19 of the People's witnesses in terms of a defense?

20 A You know, as I told you, you did not  
21 provide anything for me to review so I did not read all  
22 the questions. There definitely was a plan. I can't  
23 tell you specifically what it was today, but -- and you  
24 gave me nothing to review before this.

25 Q In fairness, wasn't it your position you

1 were not going to speak about the case until the  
2 privilege was discussed in open court before Judge  
3 Dowling, wasn't that your position to both myself and  
4 the prosecution?

5 A No.

6 Q That wasn't?

7 A No.

8 Q You said, Gary, sure, ask me anything you  
9 want, I'm happy to discuss it with you, is that what  
10 you're saying?

11 A No. I informed you there's an  
12 attorney-client privilege, but if you are the attorney,  
13 you could sit down and talk to me and ask me questions  
14 and prepare me as a witness, 'cause -- that's it.

15 Q Do you recall questioning witnesses? You  
16 did; right? You questioned some witnesses, some you  
17 had no questions for, is that fair to say, at this  
18 trial?

19 A I don't remember.

20 Q Okay. Would you agree as a general  
21 principle that you tried, from the occurrence  
22 witnesses, the people that were there at the time of  
23 this tragic shooting, to elicit the fact that General  
24 Waiters was drinking both at the night of his party and  
25 the morning of the incident, is that fair to say?



1           A     If it's -- hopefully it's obvious in the  
2 trial minutes. Like I said, I haven't reviewed the  
3 trial minutes.

4           Q     Well, you had them in your possession.  
5 You just recently gave them to me, that's fair to say,  
6 right, a few weeks ago, we met at the Marriott and you  
7 gave me the minutes?

8           A     I don't have all the trial minutes, I  
9 think I gave you some of the minutes and I didn't  
10 review --

11          Q     I'll ask you --

12                THE COURT: Allow him to finish his answer  
13 before you pose another question.

14          A     I did not review the entire file because  
15 it wasn't clear what we were doing, and no one really  
16 explained it to me.

17          Q     Do you recall asking, on page 443,  
18 Jacqueline Warren, you remember her as an important  
19 witness in the case; correct, the girlfriend at the  
20 time of Mr. Waiters?

21          A     The girlfriend, okay.

22          Q     Do you recall you asking these questions,  
23 line 18:

24                "Question: Now, while you were in the living  
25 room with Mr. Waiters and your aunt, at some point you

1 guys started drinking?

2 "Answer: Yes.

3 "Question: And around that time, this was in  
4 the morning?

5 "Answer: It had to be -- it had to have been  
6 before 11.

7 "Question: And I believe you said you had at  
8 least two Bicardi Lights and soda; correct?

9 "Answer: Yes.

10 "Question: When you had these drinks, were  
11 they in a cup or glass, or how did you drink them?

12 "Answer: In a plastic cup.

13 "Question: How big was the cup you were  
14 drinking from?

15 "Answer: A small plastic cup.

16 "Question: You see that little cup in front of  
17 you?

18 "Answer: Yes.

19 "Question: Was it bigger than that cup or  
20 smaller than that cup, or about the same size?

21 "Answer: Same size.

22 "Question: And that's an eight-ounce cup?

23 "The Court: I don't know that that is.

24 "Mr. Simons: So the jury can see.

25 "Mr. Hale: I guess.

1 "Question: And you had two of those?

2 "Answer: Yes.

3 "Question: And you said that Mr. Waiters, you  
4 observed him drink some Bicardi Light and soda; correct?

5 "Answer: Yes.

6 "Question: Was he drinking out of the same  
7 size cup?

8 "Answer: I don't remember.

9 "Question: And as I believe you stated, you  
10 don't know how many drinks he had?

11 "Answer: No, I don't.

12 "Question: Now, do you know whether he had  
13 more than one?

14 "Answer: No, I don't."

15 So you would trust I read those questions  
16 and answers correctly, Mr. Simons, or do you want to  
17 see the transcript?

18 A You have the transcript.

19 Q Do you want to see it?

20 A No, because the transcript is in evidence  
21 so.

22 Q My purpose in reading that was to attempt  
23 to refresh your recollection about the fact that you  
24 did cross examine Jacqueline Warren about the  
25 defendant's drinking both that night and particularly

1 that morning; correct? That's what I just read, right,  
2 you'd agree with that?

3 A Okay. If that's what's in the minutes.

4 Q And now my question is -- and Judge, I'm  
5 re-applying to use Defendant's C for this purpose --  
6 that Miss Warren answered that she did not know whether  
7 he had more than one, that's what I just read,  
8 Mr. Simons; correct? So my question is: Didn't you  
9 have a statement from Miss Warren that you could have  
10 impeached her with wherein she told Mr. Walker that  
11 Waiters in fact drank a pint by himself starting at  
12 8:30 on May 7th? Do you recall having that at your  
13 disposal and being able to have impeached the witness  
14 if you chose to?

15 A Okay. You --

16 MR. FARRELL: Judge, could he look at this?  
17 Just for the purpose of looking at it to refresh his  
18 recollection, can he look at Defendant's C.

19 MR. HALE: Can he answer the question before he  
20 makes the application.

21 THE COURT: Certainly.

22 A I had everything I guess at my disposal.  
23 At the time I was fully aware of my questioning and I'm  
24 sure I had a plan of why I asked specific questions and  
25 there must have been a reason why I did not ask

1 specific questions. So I can't answer that today  
2 because I don't remember. But during the course of the  
3 trial I tried to ask all the questions that I can.  
4 Sometimes I forget to ask a question, but I try to at  
5 the time ask everything I know I should ask.

6 Q Right. But my question is: Weren't you  
7 trying to help the defense, General Waiters, by  
8 eliciting the fact that he was drunk that morning?

9 A Today I don't remember the whole thing.  
10 It appears that I was trying to get that information  
11 out. But like I said, my whole questioning goes  
12 through the whole scope of the trial, what I think is  
13 common, what I think he's going to testify to,  
14 everything.

15 Q Mr. Simons, I know you've done this with  
16 great success on many trials, you know how to impeach a  
17 witness with a prior inconsistent statement; correct?

18 A Yes.

19 Q Would you agree with me that when  
20 Jacqueline Warren answered under oath to your question:  
21 "And as I believe you stated," bottom of page 444, "and  
22 as I believe you stated, you don't know how many drinks  
23 he had?, "Answer: No, I don't," you'd agree with me  
24 your investigator Mr. Walker obtained a statement where  
25 Jacqueline Warren stated that he started drinking at

1 about 8:30, that he had about a pint himself, that that  
2 was a classic inconsistency, would you agree with that?

3 A You know, I don't know, because there's --  
4 sometimes there's a reason you ask a question,  
5 sometimes there's a reason you don't ask a question.

6 Q Right.

7 A And I can't answer that because I don't  
8 remember what was going on at the time.

9 Q And I need to ask you this then: As you  
10 sit here today, did you have a strategic reason for  
11 failing to impeach Jacqueline Warren on the amount of  
12 liquor Waiters had consumed that morning, did you have  
13 a strategic reason that you can articulate?

14 A I don't remember.

15 Q Isn't it true that at the end of the  
16 People's case you sought to introduce the defendant's  
17 records from Kings County Hospital en masse from May  
18 7th to May 17th of 2006?

19 A You know, I'm sure the record will speak  
20 for itself on that one. I can't remember offhand but I  
21 probably did. I don't know.

22 MR. FARRELL: I'd ask this be marked for  
23 identification, previously shown and given to the People.

24 THE COURT: That will be marked as F for  
25 identification purposes.

Defense Witness-Simons-Direct/Farrell

102

1 MR. HALE: Which one is that? I'm sorry, Gary.

2 MR. FARRELL: That's the proceedings, 5/31. It  
3 was in the packet I gave you last week.

4 THE COURT: And then I would show whatever has  
5 been marked as F, I would show it to the People.

6 MR. HALE: Thank you.

7 A COURT OFFICER: Show it to the People?

8 THE COURT: Yes.

9 Q I apologize, Mr. Simons, that I didn't  
10 give it to you beforehand. I misunderstood your  
11 position on, quote/unquote, being prepped.

12 I'd ask you to take a minute to read your  
13 application -- well, I'd offer it in evidence.

14 THE COURT: Please don't make statements. I'm  
15 going to strike the statements that you made.

16 If there is a question for the witness, ask the  
17 question, but don't clutter the record with any asides to  
18 the witness. It's not appropriate.

19 MR. FARRELL: You're right.

20 I offer this as an exhibit in evidence.

21 MR. HALE: No objection. I think the record --

22 THE COURT: Defendant's F will be in evidence.

23 Q Mr. Simons, the bottom of page 531, do you  
24 remember, I'd like to think that you remember that you  
25 did offer a certified copy of the records from K.C.H.;

1 right?

2 A I don't remember offhand, but according to  
3 here, I did, so.

4 Q And then on page 532 the reason you're  
5 arguing that this goes toward his intoxication defense  
6 is in the record it clearly shows that he was very  
7 intoxicated and he was treated for that. Those are  
8 your words, you'd acknowledge that; right, Mr. Simons?  
9 And you go on to note --

10 THE COURT: There's a question before the  
11 witness.

12 MR. FARRELL: You're right. He didn't answer,  
13 Judge.

14 A No. What -- you were paraphrasing what I  
15 said.

16 Q I don't think I was.

17 A I missed it.

18 Q Okay. Page 532, line 3.

19 A Oh. Line 3.

20 Q To line 9.

21 A Okay. Yeah, I see that.

22 Q Okay. And going down from line 15 to line  
23 23, you're making the argument that, "Judge, this goes  
24 to the intoxication defense," even citing the section  
25 of the C.J.A. as intoxication as a defense to pertinent



1 elements of the charges, and in these records it  
2 clearly shows, and it does state, that he was  
3 intoxicated, this would be the day of the incident, do  
4 you recall that?

5 A Well, it says so.

6 Q It says so. You don't have to recall it.  
7 You're right.

8 I'd ask you to move with me to page 543,  
9 there's extended colloquy going back and forth between  
10 the parties, and reading from line 7 -- I'm sorry, line  
11 23, the bottom of page 543:

12 "The Court: Certainly one of the things that  
13 we can do, which probably should have been done, was  
14 either to have someone brought in or called to find out  
15 what the definition of that is."

16 A What are you reading?

17 Q I'm reading from the bottom of page 543,  
18 line 23, after extended colloquy between yourself and  
19 the prosecution about which records should come in, if  
20 any should come in, etcetera.

21 I'm sorry. I should have went back. I'm  
22 sorry, Mr. Simons. Could we go back to 540 -- 535,  
23 line 10:

24 "In his lab report," this is you arguing to the  
25 Court, "in his lab report they have a reading from May

1 7th which is described here, his alcohol level was in the  
2 critical state.

3 "The Court: Certainly that would be relevant.

4 Mr. Hale?

5 "Mr. Hale: Well, here's what it says. 'Ethyl  
6 alcohol, this is parenthetical, (MG/DL:386.24) C.R.I.T.,'  
7 that's a parenthetical. What does that mean? I mean, if  
8 it causes any sort of conjecture, if there's any sort of  
9 ambiguity about it, you know, it can't be just in the  
10 written document."

11 Mr. Simons, remember I showed you that  
12 record before as part of the Exhibit A, the lab record  
13 that shows specifically 386.24?

14 A Okay.

15 Q Right. So is it clear now to you after --  
16 and I know it's a ten-year-old case, or almost  
17 approaching ten, that that is exactly what you were  
18 trying to do. You were trying to get the jury to see  
19 how drunk Mr. Waiters was when he was admitted to the  
20 hospital?

21 A Well, I'm going by what I guess I said  
22 back then.

23 Q Right. And you'd agree with that, would  
24 you? Would you? I shouldn't say you should.

25 A I was trying to get all the records in.

1           Q     And specifically you handed up a record  
2     that Mr. Hale seized on, the part of the actual alcohol  
3     reading, but it was in medical terms and that was his  
4     objection, that a jury would speculate about what it  
5     meant without an expert to explain it, would you agree  
6     with that?

7           A     Well, I don't know about -- say that  
8     again.

9           Q     Ultimately you were unsuccessful in  
10    getting that reading to the jury, 386.24 critical, that  
11    jury that convicted Waiters in about an hour, they  
12    never heard that, did they, they never saw that part of  
13    the record?

14               MR. HALE: The record speaks for itself, your  
15    Honor.

16               THE COURT: Is that an objection?

17               MR. HALE: That is an objection, your Honor.  
18    I'm sorry.

19               THE COURT: I'm going to sustain it as to the  
20    form, because, again, I don't know whether it took an  
21    hour for the jury to convict the defendant or not.

22           Q     Would it be fair to say, Mr. Simons, that  
23    you were not able to get that reading to the jury that  
24    convicted Mr. Waiters, that they never saw that  
25    notation of 386.24?

1           A       I believe the record speaks for itself. I  
2 mean, it's -- I'm not going against the record so the  
3 record is clear whether they got to hear it or not.

4           Q       Okay. Back to page 543, the bottom:

5                   "The Court: Certainly one of the things we can  
6 do, which probably should have been done, was either to  
7 have someone brought in or to call to find out what the  
8 definition of that is."

9                   And then Mr. Hale says: "Exactly."

10                  I'm going to not read every reference,  
11 but, Mr. Simons, as you said very often, you're not  
12 going to refute the record, and if the record says on  
13 five separate occasions Judge Dowling suggested that  
14 you should bring in a witness to testify about the  
15 records, you wouldn't refute that, would you?

16                  MR. HALE: Objection.

17                  THE COURT: I will sustain it as to the form as  
18 to what the Court suggested.

19           Q       Okay. 547, line 14:

20                   "The Court: Quite frankly, Mr. Hale, I would  
21 agree with you, that the best way would have been to get  
22 someone from the hospital to certainly interpret the  
23 records as to those limited issues. Quite frankly, I  
24 don't know why, you know, someone wasn't called or at the  
25 very least to get an assessment by the doctor who

1 appeared, even if it was by the People, something that  
2 would assist."

3 Do you recall, or do you acknowledge,  
4 Mr. Simons, those comments made by the Judge during  
5 this extended colloquy?

6 MR. HALE: Objection.

7 THE COURT: I will sustain it. Certainly it's  
8 in the record.

9 Q Mr. Simons, there came a time at page 552  
10 that you stated:

11 "Your Honor, the defense at this point is not  
12 introducing any additional witnesses at this point. We  
13 would request that the Court permit all the information  
14 in, and we're prepared for the Court to make its ruling  
15 based on the defense not presenting any additional  
16 witnesses at this time."

17 That's when you rested your case  
18 essentially, is that fair to say?

19 A I'm sure the record -- I guess, if that's  
20 the end of the case.

21 Q My question is, and this isn't on the  
22 record, you never asked -- did you ever ask Judge  
23 Dowling for a continuance to subpoena a doctor from  
24 K.C.H. or for additional time to have an expert  
25 appointed or somebody you knew brought in so he or she

1 could testify about the meaning of some of those  
2 records so the jury would not have to speculate?

3 A The record is clear I don't think I did,  
4 but everything is on the record.

5 Q Okay. Then this is definitely not on the  
6 record.

7 Was there a strategic reason behind your  
8 failure to request a continuance or to subpoena a  
9 doctor from K.C.H. or to get an expert to come in to  
10 explain the relevance and significance of those medical  
11 terms contained in the medical records?

12 A All I do remember somewhat is toward the  
13 end of the case when Dr Drob was not going to testify  
14 and then Mr. Waiters refused to testify, I guess  
15 whatever I was thinking back then, it was my mind the  
16 case was finished so I rested. So whatever is on the  
17 record is on the record. I didn't ask for anything  
18 additional at that time.

19 Q And again, if you had a strategic reason  
20 for not going forward to try to get a doctor to come  
21 in, I'd like to hear it, if you have a reason?

22 A I don't remember. I don't remember, to be  
23 honest with you.

24 Q Page 552, last reference to this, after  
25 you said you're not going to present any additional

1 witnesses the Court stated:

2 "It's the Court's understanding the defense is  
3 not going to call any medical witnesses in order to  
4 certainly enlighten the jury as to what the numbers mean  
5 contained in the medical record, so at this point the  
6 Court only has two pages before it with two lines, one  
7 indicating 'C.N.S., unable to assess due to intoxicated  
8 state,' and the other one says '36-year-old male  
9 intoxicated or B.I.B. E.M.S., brought in by E.M.S.,  
10 intoxicated. That's really the two lines that would be  
11 relevant. Everything else" -- and then the Court makes a  
12 further ruling.

13 So based on that, Mr. Simons, you remember  
14 then that of all those records, only two lines were  
15 being admitted to the jury; correct?

16 MR. HALE: Objection.

17 THE COURT: I will sustain it. It's in  
18 evidence. It certainly will speak for itself.

19 Q After this proceeding and those limited  
20 records being admitted, Mr. Simons, you recall, as  
21 there is in every case, a charge conference?

22 THE COURT: Counsel, let me say this, it's  
23 after 1 o'clock.

24 MR. FARRELL: I'm sorry, Judge. I lost track.

25 THE COURT: I'm hoping, Mr. Simons, you're

1 going to be available this afternoon?

2 THE WITNESS: Yes.

3 THE COURT: Okay. We'll pick up at 2:15  
4 because it's after 1, and they have to bring in -- bring  
5 back up the defendant. So at 2:15 we'll reconvene.

6 I certainly, Mr. Simons, I would have to inform  
7 you, as I would instruct you as any witness, you may not  
8 discuss the content of your testimony with anyone.

9 You may step down. And I'll see the parties at  
10 2:15.

11 MR. FARRELL: Thank you.

12 THE COURT: Certainly, all the exhibits,  
13 there's one on the screen, should be handed to the court  
14 officer. The exhibit that was on the screen.

15 MR. FARRELL: Yes, Judge. Which letter was  
16 that? I'm sorry. I have a lot of papers here.

17 THE COURT: That's D, I believe, or if it's not  
18 D, E. One or the other.

19 (Luncheon recess)

20 THE CLERK: This is a recall of General  
21 Waiters, Indictment 3464 of 2006.

22 The defendant is present with his attorney.  
23 The district attorneys are present.

24 THE COURT: Any matters to go on the record  
25 before I bring the witness back in?



1 MR. HALE: Not from me, Judge.

2 MR. FARRELL: Ready to go, Judge. Thank you.

3 THE COURT: Bring the witness in.

4 A COURT OFFICER: Ready, your Honor?

5 THE COURT: Yes, please.

6 (Whereupon, the witness resumed the stand.)

7 THE COURT: Good afternoon.

8 THE WITNESS: Good afternoon.

9 THE COURT: I'm going to remind you your still  
10 under oath. You're still sworn to tell the truth.

11 Mr. Farrell.

12 MR. FARRELL: Thank you, your Honor.

13 DIRECT EXAMINATION

14 BY MR. FARRELL: (Cont'd)

15 Q Mr. Simons, I think you mentioned on more  
16 than one occasion that the defendant refused to testify  
17 at his trial, do you recall that?

18 A Yes.

19 Q Can you recall the specifics of how that  
20 came to pass, your discussion with him about  
21 testifying, could you enlighten us on how that  
22 happened?

23 A Of how --

24 Q How -- what's the basis of you saying that  
25 he refused to testify?

1           A     Because I asked him to, and he said he  
2     didn't want to testify.

3           Q     Did you advise him as his lawyer who sat  
4     with him throughout the trial that it would be in his  
5     interest to testify?

6           A     Yes.

7           Q     Even though you already testified and  
8     acknowledged on numerous occasions that the transcript  
9     speaks for itself, the witnesses said that he was  
10    drinking that morning; right?

11          A     Okay.

12          Q     And it's your position that Waiters never  
13    told you he was drinking at all; right?

14          A     Okay.

15          Q     And your defense was --

16          A     I never said he was never drinking.

17          Q     That morning, the morning of the incident  
18    maybe had one drink, I think was your testimony, is  
19    what he told you during various conversations?

20          A     Right.

21                THE COURT: Is that correct?

22                THE WITNESS: Yes.

23          Q     Is that correct?

24          A     Yes.

25          Q     Would you agree, though, that your

1 defense, as it unfolded, we're all trial lawyers  
2 here -- sorry, I withdraw that.

3 It was intoxication, ultimately your  
4 defense before the jury was that he could not form the  
5 specific intent due to voluntary intoxication, would  
6 you agree with that?

7 A That was --

8 Q That was part and parcel of your defense?

9 A It appears from especially what you read  
10 earlier today that that was part of it, yes.

11 Q And yet, you just said that you were  
12 advising Mr. Waiters to testify, however, it would have  
13 been his position that he wasn't intoxicated; is that  
14 right?

15 A Yes.

16 Q Don't you see a conflict there between  
17 your defense then and what the client would have said?

18 MR. HALE: Objection.

19 THE COURT: Sustained.

20 Q Do you recall at what point during the  
21 proceedings you had this discussion with Mr. Waiters  
22 where you advised him to testify and he told you I'm  
23 not doing it?

24 A Well, his -- his final decision is at  
25 the -- I believe towards the end of the case when he

1 said he did not want to testify.

2 Q Is it your position that's on the record?

3 A I don't know. I mean, put it this way,  
4 the record speaks for itself, so.

5 Q We all believe that at this point,  
6 Mr. Simons. My question to you is: Do you recall  
7 whether or not that statement by Mr. Waiters where he  
8 essentially refused to testify was on the record?

9 A I don't know. Like I said, the record  
10 speaks for itself.

11 MR. FARRELL: I'm going to ask this be marked  
12 as my next exhibit, your Honor, which is Defendant's?

13 THE COURT: G.

14 MR. FARRELL: Thank you.

15 I've given a copy to the People. Hopefully it  
16 will be admitted without objection. It will be my last  
17 exhibit. I'm almost done. This is the proceeding  
18 starting on 560.

19 A COURT OFFICER: Do you want me to show it to  
20 the witness?

21 MR. FARRELL: Yes. I think the People are  
22 going to graciously let this go in without objection and  
23 I would ask it be admitted as Defense G without  
24 objection.

25 THE COURT: Mr. Hale, any objection?

1 MR. HALE: No objection.

2 THE COURT: What has been marked as G will be  
3 in evidence.

4 MR. FARRELL: Thank you, your Honor.

5 Q As is the case in all trials there is a  
6 charge conference at the end of all the evidence in the  
7 case; correct?

8 A Yes.

9 Q Directing your attention to page 561, line  
10 19, you stated as follows:

11 "Mr. Simons: Judge, I don't know if you  
12 classify this as out of the ordinary, but the defense  
13 would request a charge on intoxication as pertaining to  
14 the intent elements of the charges."

15 You -- and I know the transcript speaks  
16 for itself, but you did affirmatively request the  
17 charge of intoxication which her Honor, Judge Dowling,  
18 granted you?

19 A Yes, that's what's in the record.

20 Q Why? Why did you ask for that charge?

21 A You're asking me why?

22 Q I'm asking you why did you request that  
23 charge?

24 A Apparently at the time I felt that charge  
25 was appropriate for the circumstances and evidence in

1 the case.

2 Q And there came a point during the charge  
3 conference that the Court asked the parties if any  
4 lesser included offenses should be charged. Do you  
5 recall that?

6 A Is that in the record? I don't know. I  
7 don't remember.

8 Q Okay. I'm directing your attention to  
9 563, Mr. Simons, line 18, in response to the Court's  
10 question:

11 "Any other charge, Mr. Simons?

12 "Yes, your Honor. The defense would be  
13 requesting Manslaughter in the First Degree as a lesser  
14 charge of intentional Murder in the Second Degree."

15 You now recognize, and I'm sure would  
16 acknowledge that the transcript speaks for itself, and  
17 you did ask for Man 1 as a lesser included; correct?

18 A Yes.

19 Q Mr. Simons, did you ask -- did you  
20 consider asking -- let me ask it first this way: Did  
21 you ask Judge Dowling to submit the additional lesser  
22 included of Manslaughter in the Second Degree?

23 A I mean, put it this way, I don't know. I  
24 don't think so but I'm sure the record, as I say, will  
25 speak for itself.

1           Q     I'm asking a question that is not on the  
2     record. Did you have any strategic reason for not  
3     requesting Manslaughter in the Second Degree as a  
4     lesser included of Murder in the Second Degree?

5           A     At the time I guess I requested the  
6     charges, whatever I was thinking at the time I based it  
7     on what was going on at the time. So I can't say I  
8     thought about it, I can't say I didn't think about it,  
9     I don't remember. I don't see any notes on that.

10          Q     You would agree as a very experienced  
11     lawyer that Manslaughter in the Second Degree is, and  
12     can be given, as a lesser included of Murder in the  
13     Second Degree; the Man 2 is a lesser included under the  
14     specific facts of certain cases?

15          A     Man 2 is a lesser included from?

16          Q     Murder 2, intentional, that's my question  
17     to you, do you agree with it?

18          A     I don't know. Maybe certain cases, I  
19     don't know.

20          Q     You'd agree as an experienced practitioner  
21     and veteran of hundreds, as you testified, of A-1  
22     assignments that Manslaughter in the Second Degree, the  
23     state of mind is reckless as opposed to intentional,  
24     would you agree with that?

25          A     For Man 2?

1 Q Yes.

2 A Yes.

3 Q And would you agree that the intoxication  
4 defense is -- negates specific intent but does not  
5 negate reckless conduct, would you agree with that as a  
6 principle of law?

7 A It negates the intent.

8 Q Specific intent?

9 A It does negate intent.

10 Q Right. There were several other counts  
11 that Mr. Waiters was facing involving different victims  
12 from the child, you know that; correct?

13 A Yes.

14 Q For example, Lorenzo Warren, there was a  
15 count pertaining to Attempted Murder in the Second  
16 Degree and Assault in the First Degree. My question  
17 is: Did you consider requesting reckless Assault in  
18 the Second Degree under Penal Law 120.05, sub 4, for --  
19 as a lesser included under that -- those counts of  
20 Attempted Murder and Assault in the First Degree?

21 A Um, if it's in the record. I mean, like I  
22 said, I haven't read the charge conference and I would  
23 hope I would have requested everything that I thought  
24 should have been requested at the time.

25 Q So you'd agree then if you failed to



1 request for any of the Assault in the First Degrees for  
2 Miss Clark and Miss Lewis, if there was no request for  
3 Assault in the Second Degree under a reckless theory  
4 it's because you felt it wasn't appropriate to make, is  
5 that fair to say?

6 A If I didn't make it for whatever reason,  
7 which I can't tell you specifically now, I didn't make  
8 it. Otherwise I would have made it.

9 Q That's my last question: Can you  
10 articulate a specific strategic reason for not  
11 requesting assault in the second degree under a  
12 reckless theory for the Assault 1 counts pertaining to  
13 Lorenzo Warren, Miss Clark and Miss Lewis?

14 A That I wouldn't remember.

15 Q And again, Mr. Simons, I apologize. I'm  
16 sure you never had a copy of your own summation  
17 transcript, would that be fair to say?

18 A I mean, I don't think they gave it to me.

19 Q They traditionally don't. I think we all  
20 know that?

21 THE COURT: Let's not make statements and  
22 clutter the record. I'm going to strike it. If there's  
23 a question, you can certainly inquire.

24 Q Mr. Simons, do you recall making an  
25 argument to the jury: "The evidence is clear," page

1 605, "the evidence is clear from witnesses that  
2 Mr. Waiters was intoxicated. You will see evidence on  
3 the medical record he was intoxicated."? Does that  
4 sound -- does that refresh your recollection as an  
5 argument you may well have made in this case based on  
6 the evidence as it came in?

7 A I do not remember the summation. If it's  
8 in the record, it's in the record. Otherwise, I don't  
9 remember specifically.

10 Q Do you recall stating: "It's not an issue  
11 of whether he was reckless," on page 605?

12 A I don't. I don't remember the summation  
13 so.

14 Q Do you agree that if, as you say, the  
15 record speaks for itself, and if it was in the record  
16 that you made those statements, would you agree that  
17 the jury could have seen a lot more evidence of  
18 intoxication if the records, the medical records from  
19 K.C.H., had been admitted in their entirety?

20 MR. HALE: Objection.

21 THE COURT: Sustained. Don't answer.

22 Q You ended with the statement, or in your  
23 last page on 607: "This was an unforgivable situation,  
24 a sad situation, but it was not an intentional act."  
25 Yet, you'd acknowledge if it's in the record it's in

1 the record. Would you agree then that requesting  
2 lesser includeds for reckless mental state might have  
3 been helpful in this situation?

4 A You know, like I said, I'm sticking with  
5 the record. I don't know. I mean, I asked for things  
6 I thought I should have asked for, and to go back and  
7 guess of what could have, I really can't do that.

8 Q I understand, sir. Thank you for your  
9 patience.

10 MR. FARRELL: Nothing further.

11 THE COURT: Cross examination?

12 MR. HALE: Sure.

13 CROSS EXAMINATION

14 BY MR. HALE:

15 Q Mr. Simons.

16 A Mr. Hale.

17 Q I'll start with the last first. Sir, as  
18 we've seen from the record, you did not request  
19 Manslaughter in the Second Degree nor the Reckless  
20 Assault. You'll take that as a given, it's in the  
21 record.

22 A If it's in the record.

23 Q Sir, understanding that intoxication does  
24 not preclude a conviction for a reckless crime, would  
25 it have been a reasonable strategy to go, as we say,

1 all or nothing; that is that if Mr. Waiters was not  
2 convicted of the intent crimes, then if there was no  
3 reckless crimes charged, then he would not have been  
4 convicted at all, is that a reasonable strategy?

5 A Is your question is that a reasonable  
6 strategy, or was that the specific strategy here?

7 Q I'm asking you generally, sir, is that a  
8 reasonable strategy?

9 A Yes.

10 MR. FARRELL: I'll object to that general  
11 question.

12 THE COURT: I'll sustain it.

13 Q Do you recall that as being a specific  
14 strategy in this case?

15 A No.

16 Q Let me ask you this, sir: Coupled with  
17 your request for an intoxication charge, which you got,  
18 could that have been the reasonable strategy in not  
19 asking for the lesser includeds that included a  
20 reckless element?

21 A To answer that, as I said, I don't  
22 remember what the specific strategy was at this time.

23 Q Let me ask you this, though, sir: Do you  
24 recall whether you had conversations with your client  
25 about the impact of various charges and whether such

1 charges should be submitted to the jury, do you recall  
2 whether you did or not?

3 A That I don't recall. Probably not,  
4 though.

5 Q Sir, with regard to the trial, as part of  
6 the trial I think that you've testified that in the  
7 early phases of the prosecution you had the defendant  
8 examined by Dr. Drob to see whether there was any  
9 psychiatric or psychological issues that might form a  
10 defense; is that correct?

11 A Yes.

12 Q Now, before that time you had, as I think  
13 you've testified, had had a conversation with  
14 Mr. Waiters where he had indicated to you that he had a  
15 specific recollection of the event and it did not  
16 include him being drunk; is that correct?

17 A Yes. We had numerous conversations.

18 Q Would it be fair to say, sir, that those  
19 conversations included his position that he had  
20 retrieved the weapon because he was afraid of or  
21 defending himself against the older son Lorenzo and  
22 fired the gun not intending to hit anybody but just to  
23 scare Lorenzo?

24 A During our conversations, and if I can  
25 refer to my notes, most, I believe, of the

1 conversations there was a -- he fired the weapon to  
2 scare. I believe one conversation he might have fired  
3 to hit him in the leg. So like I said, we had multiple  
4 conversations so it was either to scare him or to hit  
5 him in the leg.

6 Q At any point did you have any conversation  
7 to the effect that Mr. Waiters said, you know, I'd like  
8 to help you out, Mr. Simons, but I was so drunk I don't  
9 remember what happened or what I did?

10 A No.

11 Q Now, you recall that Dr. Drob issued a  
12 report at the conclusion of his psychological  
13 examination, do you not?

14 A Yes.

15 MR. HALE: Can we have this as People's -- what  
16 number would we be?

17 THE COURT: It would be 1 for the purposes of  
18 the hearing.

19 MR. HALE: For the purposes of the hearing,  
20 People's 1.

21 THE COURT: Showing that to defense counsel, or  
22 do you have a copy?

23 MR. FARRELL: I have a copy.

24 MR. HALE: Could I offer that in evidence, sir?

25 THE COURT: Any objection?

1 MR. FARRELL: No objection.

2 THE COURT: People's 1 will be in evidence.

3 A COURT OFFICER: So marked.

4 Q Now, sir, I'm going to ask you to look at  
5 the report, and specifically to a section which it  
6 describes the defendant's -- and I'll find a page  
7 reference -- description of the event. I'll give you a  
8 page reference, I'm sorry.

9 It starts at page 5 and continues to the  
10 middle or to the top of page 7. If you could just look  
11 at that, sir.

12 A Okay. You want me to read it?

13 Q I'm sorry?

14 A Do you want me to read it or do you have a  
15 question?

16 Q I just want you to read it and then I will  
17 have a question, if that's okay.

18 A Okay.

19 Q Now, sir, the statement that he gave to  
20 the -- Mr. Waiters gave to Dr. Drob concerning the  
21 incident was in large part consistent with what he had  
22 told you earlier; isn't that correct?

23 A Yes, it's very similar.

24 Q And at no point during that interview did  
25 he indicate to Dr. Drob that he was so drunk that he

1       couldn't recall or so drunk that he couldn't control  
2       his actions, did he?

3               A       Well, Dr. Drob didn't write that, no.

4               Q       He didn't write that down?

5               A       Right.

6               Q       In terms of what the report says?

7               A       Yes.

8               Q       And in fact, the report indicates again  
9       that Mr. Waiters had said to Dr. Drob, as per the  
10      report, that in fact he had not been drinking for some  
11      time, he had been drinking earlier but not at or around  
12      the time of the incident; is that correct?

13              A       Yes.

14              Q       Sir, you also recall that because of your  
15      interview of Mr. Waiters by Dr. Drob that he was also  
16      interviewed and evaluated by Dr. Barday as hired by the  
17      People; is that correct?

18              A       Yes.

19                      MR. HALE:  If we could have this as People's 2  
20      for the hearing.

21                      MR. FARRELL:  No objection.

22                      THE COURT:  People's 2 will be in evidence.

23                      A COURT OFFICER:  So marked.

24              Q       Again, sir, I'm going to direct you to a  
25      specific part of that report, and this starts at the



1 bottom of page 6 and continues to about three-quarters  
2 of the way down on page 7. If you could read that,  
3 please.

4 A Okay.

5 Q You've had an opportunity to do so, sir?

6 A Yes.

7 Q Is it also fair to say, sir, in  
8 conversation was Dr. Barday, as indicated by the report  
9 of Dr. Barday, that again, the defendant, Mr. Waiters,  
10 told a similar story to the effect that he was -- felt  
11 threatened and was firing to scare Lorenzo and, again,  
12 did not have intent to hurt or injure anybody?

13 A Yes.

14 Q And I think that you were shown earlier  
15 your opening statement to the jury in the trial of this  
16 case, and that pretty much was the substance of your  
17 opening statement, that he didn't intend to shoot or  
18 hurt anyone; is that correct?

19 A I'll stand by whatever I said.

20 Q Okay. Now, it's true, sir, that in  
21 neither report did either of the doctors opine that in  
22 any way Mr. Waiters was suffering from an  
23 alcohol-induced psychosis or anything of that nature;  
24 is that correct?

25 MR. FARRELL: I'd object to that. He can't

1           testify. The reports are in evidence, Judge. I'll rely  
2           on you to read them.

3                   THE COURT: I'm going to overrule it and permit  
4           the witness to answer.

5           Q     If you can, sir.

6           A     The reports really speak for themselves.  
7           I don't think there's anything. I don't remember  
8           seeing any of those words in any of these reports or  
9           anything.

10          Q     Now, during the course of the trial, and I  
11         believe you've testified about this already, you had  
12         intended to call Dr. Drob; is that correct?

13          A     Yes.

14          Q     And during the course of the trial or some  
15         time before the trial, did it become your opinion that  
16         in fact Dr. Drob's examination, his evaluation and his  
17         conclusion would not establish a defense or a  
18         mitigation to the charges?

19          A     I believe at some point in the trial, and  
20         then talking to Dr. Drob, I made the decision that his  
21         testimony would not help Mr. Waiters so I didn't call  
22         him.

23          Q     Now, you had indicated that the plan was  
24         that Mr. Waiters would in fact testify; is that  
25         correct?

1 A Yes.

2 Q And sir, what was the expected testimony  
3 to be, if you recall?

4 A Mr. Waiters was going to testify about the  
5 incident and whatever he said would have been fine for  
6 the case, and then the hope would be that he would  
7 explain the situation, even if he explained it the way  
8 he explained to Dr. Drob and the other doctor, and then  
9 he would give some remorse regarding the victims that  
10 he shot.

11 Q Again, along the lines of he didn't intend  
12 to hurt anybody and he felt real bad about what had  
13 happened?

14 A That's what -- you put a defendant on to  
15 testify to explain the situation and that's what you  
16 hope he says, but whatever he says would have been fine  
17 for his defense.

18 Q And as I think that you indicated to  
19 Mr. Farrell on direct examination, you did not place  
20 yourself in a position of suggesting to him any  
21 particular story to tell or any particular defense that  
22 might come up?

23 A No. I did not tell him what his defense  
24 should be.

25 Q And the decision not to testify, whose

1 decision was that?

2 A That was Mr. Waiters'.

3 Q And he did that after consultation with  
4 yourself; is that correct?

5 A Yes.

6 MR. HALE: Excuse me just a moment.

7 THE COURT: Certainly.

8 Q Now, sir, I know -- well, you don't  
9 remember having a specific strategy in mind with regard  
10 to this case because of the time passage; right?

11 A Yes.

12 Q Can you say, sir, whether if not  
13 remembering the particulars of the strategy whether you  
14 were pursuing a strategy that you felt was in the best  
15 interest of Mr. Waiters?

16 A Yes.

17 MR. HALE: I have no further questions, your  
18 Honor.

19 MR. FARRELL: A little redirect, your Honor, if  
20 I may?

21 THE COURT: Certainly.

22 REDIRECT EXAMINATION

23 BY MR. FARRELL:

24 Q With regard to the last question,  
25 Mr. Simons, did that strategy, that strategy included

1 intoxication, the defense of intoxication; correct?

2 A I mean, based on the record it appears,  
3 yes, that was part of it.

4 Q Mr. Hale asked you about Dr. Drob and  
5 whether you expected him to testify during the trial,  
6 and you said you made a determination during the trial  
7 that his testimony would not help, is that fair to  
8 characterize your testimony?

9 A Yes.

10 MR. FARRELL: Officer, could we have the letter  
11 that's admitted in evidence, the letter from Mr. Simons  
12 to Mr. Waiters.

13 THE COURT: That would be D. D, as in David.

14 MR. FARRELL: The letter from Mr. Simons to  
15 Mr. Waiters.

16 A COURT OFFICER: You said D?

17 THE COURT: D.

18 MR. FARRELL: You can give it to Mr. Simons.

19 Q Mr. Simons, I know you've seen that letter  
20 before. Isn't it true that months before the trial,  
21 late in the fall, October of 2007, you recognized Drob  
22 wasn't going to help the defense and you told that to  
23 Waiters in that letter; isn't that right?

24 A Yeah. I told him that in the letter that  
25 the defense would be difficult but the ultimate

1 decision whether he was going to testify wasn't until  
2 the very end.

3 Q The ultimate decision of whether Drob  
4 would testify?

5 A Yes.

6 Q Did you testify on cross that the  
7 testimony that you would have elicited from  
8 Mr. Waiters, had he chose to testify, was that he  
9 wasn't trying to hurt anybody and that he was sorry  
10 about what happened, that would have been his defense?

11 A No, I didn't say that.

12 Q Well, what do you believe his defense  
13 would have been had he testified?

14 A No. He would have testified about the  
15 whole incident from the -- whatever he was going to say  
16 regarding the family, his problems with Lorenzo, his  
17 fears, his concerns, everything.

18 Q Yet, it's your testimony that at no time  
19 did Mr. Waiters admit to you that he was drinking up to  
20 a pint of booze that morning, the morning of the  
21 shooting?

22 MR. HALE: Objection. It's improper redirect.

23 THE COURT: I will sustain it as to the form of  
24 the question.

25 Q Did Mr. Waiters, you -- Mr. Simons, as an

1 experienced lawyer, you knew that Dr. Drob's report and  
2 what Mr. Waiters was telling you, that they  
3 contradicted the medical records from K.C.H., you knew  
4 that; right?

5 A I knew what he said, I knew what Dr. Drob  
6 said, I knew what the medical records said, so.

7 Q And as an experienced defense lawyer, you  
8 knew that there was a contradiction; right? On the one  
9 hand the record said he was very drunk, yet he's saying  
10 he wasn't drinking for eight or nine hours.

11 A Um, I know what the medical records said,  
12 I know what he said and what he said repeatedly, so I  
13 have to make decisions based on what my client wants  
14 and what he wants to do.

15 Q And in this case your testimony is that he  
16 did not want to testify, you've been clear about that;  
17 correct?

18 A He -- on the day he was supposed to  
19 testify he said he did not want to testify.

20 Q Yet you made no such record before the  
21 Court that you had this discussion, that you advised  
22 him it's his right and his right alone to testify and  
23 that he was not invoking his constitutional right, you  
24 didn't do that on the record, did you?

25 A You know, I don't know. I don't know if

1 the Court did. Usually the Court does it. The Judge  
2 does that. So if it's in the record, it's in the  
3 record.

4 MR. FARRELL: I have nothing further.

5 THE COURT: Any recross?

6 MR. HALE: I don't have any recross, but thank  
7 you.

8 THE COURT: Thank you. You may step down and  
9 step out of the courtroom.

10 THE WITNESS: Thank you.

11 THE COURT: Any other witnesses, Mr. Farrell?

12 MR. FARRELL: No, your Honor. The defense has  
13 no other witnesses. Thank you.

14 THE COURT: People?

15 MR. HALE: Your Honor, the People have no  
16 witnesses. I just want to make sure that the entirety of  
17 the trial record is in evidence for the Court to  
18 consider. There's passages there that relate to the  
19 incident. As Mr. Simons said repeatedly, the record  
20 speaks for itself.

21 THE COURT: The record speaks for itself, so it  
22 would be, it's part of the court proceeding and certainly  
23 the parties are relying on it to make their arguments one  
24 way or the other. And so, certainly, the trial record  
25 has to be somewhere in the courthouse. But the record as



1 a whole, that's what the parties are relying on, the  
2 certified records, the transcripts made by the reporters.

3 MR. HALE: And if the Court doesn't have it, we  
4 can provide a copy of the certified record.

5 But, your Honor, the People have no evidence.

6 THE COURT: And I believe you indicated that  
7 you wanted to make your closing in writing?

8 MR. FARRELL: In writing, Judge. I did put in  
9 what I think is a substantial memoranda of law; however,  
10 based on the testimony, I certainly would seek leave to  
11 supplement that with additional arguments. And I think  
12 the People reserved their right to make that  
13 argument-in-chief or their legal argument-in-chief.

14 MS. GROB: That's correct, your Honor.

15 MR. FARRELL: What do you think in terms of a  
16 date?

17 May we approach to discuss a briefing schedule?

18 THE COURT: You can do it on the record.

19 MR. FARRELL: We can do it on the record.

20 THE COURT: It's going to be on the record. I  
21 don't want Mr. Waiters to think the Court is saying  
22 something to counsel that he's not aware of, so let's do  
23 it on the record.

24 Even if you tell me that, for instance, today  
25 is the 29th that you need until the 30th of June to

1 complete whatever arguments you would have in writing,  
2 Mr. Farrell, certainly I would give you that.

3 Then People, I don't know how much time you  
4 would need after that in order to put in your papers, and  
5 I would give you that additional time. But I would be  
6 inclined to do it this way. If in fact Mr. Farrell says  
7 that he's going to submit his papers on the 30th, then I  
8 would have the case put on for the 30th so that I know  
9 that his papers have been done, you have them in hand and  
10 stamped.

11 People, then you can give me an estimate of how  
12 much time you would need in order to reply to that, with  
13 the understanding that, certainly, Mr. Farrell may  
14 certainly want to submit some papers and reply to your  
15 papers and we can factor that in. But at least we'll  
16 have a more accurate assessment of how much time, People,  
17 you would need to respond.

18 MR. FARRELL: Judge, that's a fair schedule.  
19 Just because of some personal time and a trial, if I  
20 could have one more week, if I could have my papers to  
21 you and the People for July 7th, that would be my  
22 application.

23 THE COURT: Under those circumstances I'm going  
24 to put it on for July the 7th. Certainly you can come in  
25 with your papers, Mr. Farrell, in order to serve on the

1 People, but I'm telling you now that once the People have  
2 given me their assessment as to how much time they need,  
3 then I'm going to be inclined to give them the same kind  
4 of time that you've had to reply.

5 MR. FARRELL: That's more than reasonable.

6 MS. GROB: Thank you, your Honor.

7 THE COURT: I'm not going to shortchange you on  
8 the time. If he's asking for five weeks, I'll give you  
9 five weeks to respond.

10 MR. HALE: With that kind of adjournment  
11 Mr. Waiters will go upstate. I don't know if you want to  
12 do an intermediary adjournment.

13 MR. FARRELL: If it's okay with you, and I know  
14 it's some inconvenience to the Court, if we can do the  
15 ten days. Not that you have to see him, I will see  
16 Mr. Waiters on those ten days, as we've been doing.

17 THE COURT: The problem is since it's such a  
18 lengthy adjournment I don't believe we need to keep him  
19 downstate for that length of time.

20 MR. HALE: Then I'll do an order to produce him  
21 to bring him back here.

22 MR. FARRELL: All right, your Honor. Thank  
23 you.

24 (Continued on following page for transcription  
25 purposes.)

Proceedings


139

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MR. HALE: Thank you.

THE COURT: July 7th.

CERTIFIED TO BE A TRUE  
AND CORRECT TRANSCRIPT

  
THERESA SANTILLI  
OFFICIAL COURT REPORTER